BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers	)	CCB/CPD File No. 98-63

REPLY COMMENTS OF TIME WARNER TELECOM

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ATTORNEYS FOR TIME WARNER TELECOM

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Time Warner Telecom ("TWTC"), by its attorneys, hereby files these reply comments in response to the Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

The pivotal issue raised in the Notice is whether CLEC access charges should be regulated. This issue is of course a subsidiary of the larger question of whether providers of switched interstate access service, ILECs as well as CLECs, are able to exploit a market failure. Virtually every question raised in the Notice and discussed in the comments turns at least in significant part on the Commission's answer to this question.

In its comments, TWTC demonstrated that any concern that the market for originating interstate access service does not currently function will likely disappear soon as providers transition toward providing bundles of local and long distance service. Because of this broader industry trend, it appears that only interim measures are needed to address the concern raised by Sprint in its comments that geographic averaging of long distance service causes a market failure for CLEC originating access. Moreover, the appropriate deregulatory and market-based measure for addressing this concern is to allow long distance carriers to pass through to their customers the differential between CLEC and ILEC access charges.

Once the Commission is confident that CLEC originating access charges are subject to adequate market pressure, the question of how to address terminating access is easily resolved. The Commission can ensure that the market forces that apply to the originating side extend also to terminating access if it establishes a rule that a CLEC's terminating rates may not exceed its originating rates.

If these remedial measures are adopted, there should no longer be any question as to the reasonableness of CLEC access charges. But it is also critical for the Commission to ensure that IXCs do not attempt to use impermissible self-help measures (e.g., refusals to pay or interconnect) to dictate CLEC access rates. The Commission must explicitly prohibit IXCs from resorting to this kind of self-help. IXCs must instead be limited to challenging CLEC access charges via the Section 208 complaint process.

As to Phase II pricing flexibility and geographic deavagering, these issues turn significantly on whether the Commission concludes that the interstate access market functions in a competitive manner. If the Commission concludes that it does not, then the Commission should abandon any suggestion of Phase II flexibility and further geographic deaveraging. Indeed, the Commission would also likely be required to vacate all of the pricing flexibility measures adopted for switched access in general. If the Commission decides that the access market does function, then Phase II flexibility and further geographic deaveraging should be implemented in the manner described in TWTC's comments.

Finally, there is no evidence in the record to support a capacity-based rate structure for the switching element. Even long distance carriers, the intended beneficiaries of the Commission's proposal, agree that capacity-based charges would be difficult to administer and are unlikely to increase consumer welfare significantly.

II. THE COMMISSION SHOULD, AT MOST, EXTEND REGULATION ONLY TO CLEC TERMINATING ACCESS CHARGES.

As TWTC explained in its comments (at 4), it is critical that the Commission consider CLEC originating and terminating access charges separately. The record in this proceeding demonstrates that originating CLEC access charges need not be directly regulated. At most, the Commission need only allow long distance carriers to pass through to end users the amount by which a CLEC's access charges exceed the relevant ILEC's access charges. Moreover, the record also supports TWTC's view that requiring CLEC terminating access charges be no higher than originating access charges will address any perceived market failure on the terminating side.

The Commission must recognize, however, that regulatory intervention on either the originating or terminating side has important implications for the rules applicable to ILEC switched interstate access. As TWTC stated in its comments (at 14 n.16), the basis for deregulating ILEC switched access charges is that CLEC entry disciplines ILEC pricing and diminishes the ILECs' opportunities for exclusionary behavior.[1] If they exist, essentially the same market forces that justify ILEC pricing flexibility also discipline CLEC pricing and obviate the need for CLEC regulation. However, if the Commission decides that CLECs are able to exploit a market failure on either the originating or terminating side, then ILECs are likely able to exploit the same market failure. Any regulatory intervention designed to eliminate CLEC exploitation of a local bottleneck <u>must</u> therefore be accompanied by a fundamental reassessment of the deregulatory measures adopted for ILEC access charges.

A. There Is Every Reason To Believe That The Market Can Resolve Any Perceived Problems Associated With Originating CLEC Access Charges.

On the originating side, the record supports the view that there is little need for regulatory intervention at this time. Even several of the long distance carriers state in their

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1 <u>See, e.g.</u>, <u>Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance form Regulation as a Dominant Carrier in the Phoenix, Arizona MSA</u>, CC Docket Nos. 96-262, 94-1, CCB/CPD File No. 98-63, CC Docket No. 98-157, *Fifth Report and Order*, ¶¶ 69, 79-80 (rel. Aug. 27, 1999).

comments that the Commission need not be concerned with unreasonably high CLEC originating access charges. See MCI WorldCom Comments at 19, Cable & Wireless Comments at 3 n.5. Sprint concedes that the magnitude of the purported problem with CLEC originating access is small. See Sprint Comments at 27 (stating that over 90% of the Sprint long distance traffic subject to CLEC access charges is terminating traffic). Indeed, given their small market share, the CLECs' access charges (originating as well as terminating) likely have no discernable effect on the averaged long distance rates charged by IXCs. Furthermore, as TWTC explained in its comments, the imminent emergence of competition in the form of bundled local and long distance service offerings will likely eliminate the distinction between local and long distance on the originating side and thus eliminate any potential market failure associated with CLEC originating access charges.

Given this context, any regulations adopted in this proceeding should be narrowly tailored and interim in nature. Moreover, such measures should, as the Commission has indicated, rely on market-based solutions to the extent possible. See Notice at ¶ 247. It is much more prudent to free up carriers to respond to market pressures by eliminating regulation than it is to impose new regulations that will soon become unnecessary.

Some regulatory response may be appropriate on the originating side in light of the concerns raised Sprint. Sprint submitted along with its comments a paper by Charles River &

Associates ("CRA")[2] in which CRA asserts that geographic averaging for long distance service creates a market failure for CLEC originating access. CRA observes that IXCs are not able to pass through to customers high originating access charges because IXCs must charge comparable rates for interstate long distance to all of their customers. As CRA points out, since each CLEC serves only a small percentage of the local exchange customers, increases in a CLEC's access charges cause non-CLEC customers to pay for the increased access charges.

Unfortunately, Sprint's proposed solution to this problem is to add unneeded regulation. Sprint would have the Commission establish new regulations prohibiting CLECs from charging interstate access prices that exceed those charged by the ILECs with whom the CLECs compete.[3] While Sprint seems to think its proposal would be simple to implement, it is not clear that this is true. For example, many CLECs compete with several different ILECs in a particular area. TWTC competes with GTE, Sprint and BellSouth in Orlando. Where CLECs enter areas served by multiple

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2 See Jan Paul Acton & Stanley M. Besen, "An Economic Analysis of CLEC Access Pricing" (Oct. 28, 1999).

3 Sprint recommends further that CLECs be permitted to pass through any additional interstate access charges directly to end users. See Sprint Comments at 21. While Sprint and the Commission have tried to characterize the latter feature as some sort of "escape valve" for access charges, in truth it adds no new cost recovery opportunities for CLECs since CLECs are already permitted to charge their local service end users essentially any price they choose. Sprint's proposal is therefore simply that CLECs not be permitted to charge interstate access charges higher than the ILECs with whom they compete.

ILECs, Sprint's approach would require the Commission to establish parameters for setting the appropriate CLEC charge. Thus, the Commission could require CLECs to charge the interstate access rate of the ILEC in whose territory a particular CLEC customer is located, leaving some CLECs with three or even more different rates in a single urban area. Alternatively, the Commission could require or permit CLECs to establish a weighted average of the relevant ILEC rates. No doubt there are many other means of addressing this issue. The important fact is that finding the right solution or combination of solutions will be quite complex and contentious.

More fundamentally, this and other aspects of Sprint's proposal would require the Commission to establish detailed and unnecessary regulations in direct contradiction of its stated, and sound, desire to address CLEC access charges in the least regulatory manner possible. Under Sprint's plan, CLECs would likely be forced to file with the Commission on an annual basis (and perhaps every time they change their rates during the year) some representation that their average charges for interstate access do not exceed the relevant ILECs'.[4] The Commission would be presumably required to review such submissions for each of the more than 100 CLECs providing interstate access. This requirement would probably apply even to CLECs that currently charge interstate access rates on a par with the relevant ILECs,

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4 Since CLEC access charge rate structures are often different from the ILECs', such filings would not be a simple matter of comparing ILEC to CLEC FCC tariffs.

since there is no way to distinguish such CLECs from CLECs that charge high interstate access rates. There would also be no easy way to determine at what point such reporting and reviewing ceases to be necessary (that is, at what point market forces adequately discipline originating access). As with most regulation, it is likely that the requirements in question would remain in force long after they are no longer (if they were ever) necessary.

AT&T also proposed regulatory solutions to the CLEC originating access issue, but those proposals are no better than Sprint's. Under AT&T's permissive detariffing approach, if the CLEC seeks to tariff its access charges above the relevant ILEC rate, it would be forced to provide detailed cost support that even ILECs are rarely required to provide. See AT&T Comments at 31. It is hard to see how this solution furthers the Commission's goal of limiting the introduction of new regulations. AT&T offers CLECs that do not wish to be subjected to cost proceedings the alternative that they may "negotiate" their access charge rates with long distance carriers. See id. at 30. Of course, such negotiations are likely to allow AT&T and other big long distance carriers the authority to essentially dictate to the CLEC the rates the long distance carrier wishes the CLEC to charge. It may also be that a large CLEC could reverse the tables on small IXCs and force them to pay high access rates. Such inconsistent results should not be encouraged because they are merely a function of relative bargaining power, not underlying efficiency.

A far better solution to the problem described by CRA would be to allow IXCs to pass through the difference between CLEC access charges and ILEC access charges to their long distance customers. This approach addresses the concerns raised by CRA because it reduces the harmful consequences of long distance averaging. But it is superior to the Sprint and AT&T proposals for several important reasons. First, a pass-through would be deregulatory because it would relieve the IXCs of their obligation to average certain rates. IXCs would be free to choose the manner in which they recover the difference between the CLEC and ILEC rates in the area in which the CLEC provides service. Second, there would be no risk that the measure would continue after it is no longer necessary since IXCs would only be permitted to pass through access charges if and to the extent that they exceed the ILEC rates.

Third, granting IXCs the right to pass-through CLEC access charges above the ILEC rate would, by itself, likely discipline extreme outlier CLECs. TWTC suspects that the mere announcement by IXCs that they will pass through access charge differentials to CLEC customers would cause CLECs that charge extremely high access rates to bring their originating access charges more in line with the relevant ILEC charges. Under the pass-through approach, therefore, the problem could largely disappear without any further action by regulators or IXCs.

Finally, such action as IXCs take will be targeted only to those CLECs with high originating access charges. Unlike the Sprint approach, therefore, the pass-through would apply only where necessary to allow IXCs to recover specified costs from the end users that cause the IXCs to incur those costs.

Where necessary, passing through the access charge differential to long distance customers would appear to be a relatively simple affair. The IXC could compare the average interstate access charge price for the relevant ILECs and a particular CLEC and then bill the end user on a regular interval for the differential. The IXC should be permitted to inform the customer that the charges are in fact caused by the customer's CLEC and that if the customer wishes to avoid such charges the customer should either ask the relevant CLEC to lower its access charges or the customer may subscribe to either the ILEC or a CLEC that charges rates comparable to the relevant ILEC rate.[5]

Only Sprint among the long distance carriers seems to think that a pass-through raises significant practical problems.[6]

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5 Sprint argues that pass-throughs would automatically result in customers switching back to ILEC local service, which Sprint observes is not a result the Commission should be encouraging. See Sprint Comments at 28. In fact, however, a pass-through would cause either (1) the CLEC with high access charges to quickly lower its rates, (2) the CLEC's customer to switch local service to a different CLEC whose originating interstate access charges are not high enough to cause a pass-through, (3) the customer to switch its local service back to the ILEC, or (4) the customer to choose to pay more for the combination of the CLEC and the IXC in question. It also seems likely that some IXCs would choose not to pass through CLEC access charges as a means of competing on price with IXCs that do take advantage of the pass-through.

6 Indeed, AT&T and MCI WorldCom both support pass-throughs as alternative means of addressing the CLEC originating access issue. See AT&T Comments at 30 n.53; MCI WorldCom Comments at 19-20.

Sprint's argument that this solution would cause customer confusion (Sprint Comments at 27) is unconvincing since the vast majority of CLEC customers are relatively sophisticated businesses.

It is also hard to see why, as Sprint contends, it would be difficult to keep rate differentials up-to-date. See id. As mentioned, given that the broader industry trends will likely eliminate the problem altogether, tracking rate differentials will likely no longer be required in the near future. In any case, Sprint has itself shown that it is easy enough to keep data for determining access charge rate differentials. It did so as part of its comments in this proceeding. In addition, Sprint has recently sent letters to CLECs, including TWTC, in which it seeks a reduction in the CLECs' interstate access rates based on an analysis of the difference between the CLECs' and the relevant ILECs' interstate access charges. If the relevant data were available in these contexts, it is hard to see why it would be so difficult to continue to track the data for the purposes of a pass-through.

For the same reason, it is hard to give much credence to Sprint's argument that its billing systems might not be able to track the information necessary to pass through access charge differentials. See id. at 27-28. Again, it has been apparently easy enough to capture that information in other contexts.

Nor would passing through access charges to long distance customers result in a violation of the Section 254(g) geographic averaging requirement. Higher long distance rates in this case would be imposed on a customer by virtue of its decision to subscribe to a CLEC with high access charges, not because of the geographic location of the customer. The customer would continue to have the choice of taking its local service from the ILEC or a CLEC with low access charges and the lower (averaged) long distance rate. Thus, "averaged" long distance rates would continue to be available to all customers. See Sprint Comments at 27. In any event, any increase in long distance charges is likely to be temporary given the emergence of competitive offerings of bundled local and long distance.

Even if it were the case that a pass-through of CLEC access charges would result in a violation of the geographic averaging requirement, Congress specifically contemplated that the FCC "could continue to authorize limited exceptions to the general geographic rate averaging policy using the [forbearance] authority provided by new Section 10."[7] Granting a limited forbearance of the geographic averaging requirement would be appropriate here since all three prongs of Section 10 are met.[8] First, enforcement of the averaging requirement in this case is not necessary to ensure just and reasonable and nondiscriminatory rates for customers in rural and high cost areas since the geographically averaged rates will continue to be available to those customers.[9] Second, continued availability of the averaged

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7 See S. REP. NO. 230, 104th Cong. 2d Sess. 132 (1996).

8 See 47 U.S.C. § 160(a)(1)-(3).

9 This situation is therefore different from the proposal, previously rejected by the Commission, to allow IXCs to

long distance rate for ILEC (and in some cases CLEC) subscribers in rural and high cost areas would ensure that "enforcement of [geographic averaging] is not necessary for the protection of consumers." 47 U.S.C. 160(a)(2). Third, forbearance would be in the public interest because it would allow the Commission to achieve its desired policy result through deregulatory rather than regulatory measures.[10]

In sum, the pass-through approach is the most appropriate means of addressing CLEC originating access charges. It is also fully consistent with Section 254(g).

B. The Commission Should Address Any Perceived Market Failure On The Terminating Side By Requiring That A CLEC's Terminating Access Charges Be No Higher Than Its Originating Access Charges.

As TWTC argued in its comments, the most appropriate means of addressing any perceived market failure on the terminating side of CLEC access charges is to require that CLEC terminating access charges are no higher than their originating access

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depart from averaging in areas served by carriers "that may be able to offer lower rates for interexchange services because of lower access charges or other costs." Policy and Rules concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended, *Report and Order*, 11 FCC Rcd 9564, ¶ 38 (1996). That proposal contemplated allowing a carrier to cease offering averaged rates entirely in specific areas by lowering prices to meet competition from competitors that only served low costs regions. The Commission rejected this proposal based on the concern that it would result in unreasonably high rates for high cost areas. See id. at ¶ 39.

10 See 47 U.S.C. § 160(b)(stating that a the promotion of competitive market conditions can constitute the basis for a public interest finding under Section 160(a)).

charges. Permitting long distance carriers to pass through the differential between ILEC and CLEC access charges as described above would eliminate any concern that originating access charges are not subject to competitive pressures. Furthermore, tying terminating and originating access charges would cause the market pressures applicable to the originating side to discipline the terminating charges. No party has offered any basis for challenging this conclusion.

C. The Only Appropriate Means For IXCs To Challenge CLEC Access Charges Is A Section 208 Complaint.

The mechanisms described above should eliminate any concern that CLEC access charges are somehow unreasonable. Yet where an IXC is unwilling to use legitimate market-based measures (e.g., incentives offered to end users, pass-throughs, offers of bundled services) to address CLEC access charges, the Commission must make clear that the IXC's only alternative is to file a complaint under Section 208 of the Act. As TWTC and others explained in their comments, it is important that the Commission ensure that IXCs do not resort to inappropriate forms of self-help in order to address what they perceive as high CLEC access charges. See TWTC Comments at 19-22. For example, IXCs must be specifically prohibited from (1) withholding access charge payments from CLECs whose rates they view as too high prior to obtaining a Commission ruling to that effect, (2) refusing to carry traffic originating or terminating on the networks of targeted CLECs, (3) disconnecting their networks from such CLECs' networks, or (4) refusing to connect their networks with such CLECs' networks.

The Commission should not allow this matter to become a free-for-all in which IXCs are able to take advantage of the full measure of their leverage against CLECs and their customers. Instead, IXCs must be required either to seek relief from purportedly high CLEC originating access charges through the market mechanisms identified above or through complaint proceedings.

III. THE COMMISSION MUST RESOLVE THE STATUS OF CLEC INTERSTATE ACCESS SERVICES BEFORE IT CAN ADDRESS ISSUES REGARDING PHASE II PRICING FLEXIBILITY FOR COMMON LINE AND TRAFFIC SENSITIVE ELEMENTS OR FURTHER GEOGRAPHIC DEAVERAGING.

In its comments, TWTC described the manner in which the Commission should implement Phase II pricing flexibility for common line and traffic sensitive services. See id. at 23-27. TWTC urged the Commission to adopt Phase II triggers that were designed to limit the potential for ILEC exclusionary pricing behavior. TWTC also described the conditions under which the Commission should consider geographic deaveraging of common line and switching elements. See id. at 28-31. TWTC urged the Commission not to permit such deaveraging for common line elements until either adequate competitive entry could be relied on to prevent ILEC abuse of its deaveraging rights or unbundled loops are geographically deaveraged in a particular state. TWTC opposed deaveraging switching under any circumstances.

While TWTC continues to believe that its proposed approach to Phase II pricing flexibility and geographic deaveraging are sound, it has become increasingly clear that the Commission cannot even address these issues until it resolves the manner in which it will deal with CLEC interstate access charges. As discussed above, if the Commission decides that it must regulate CLEC switched access rates, there is no sense in even entertaining further pricing flexibility for ILEC originating switched access charges. Indeed, the Phase I measures already adopted for switched services would need to be fundamentally reassessed and probably scrapped. Again, the premise of the FCC's framework for deregulating ILEC switched access charges is that CLEC entry disciplines ILEC prices and obviates the need for continued regulation. But if the Commission decides that ILEC switched access prices do not discipline CLEC switched access prices, it cannot very well continue to rely on CLEC entry as the basis for deregulating ILEC switched access prices.

This point is also relevant to geographic deaveraging for common line elements. For example, as TWTC explained in its comments (at 30), one context in which it seems logical to permit geographic deaveraging for the common line element is where unbundled loops are deaveraged. This conclusion is based on the premise that continued geographic averaging of common line access elements while unbundled loops are deaveraged would expose ILECs to competitive arbitrage. Indeed, the ILECs generally attempt to justify geographic deaveraging as a means of avoiding the arbitrage that may result where UNEs are deaveraged.[11] But if the Commission concludes that providers of interstate access

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[11] See, e.g., Comments of BellSouth at 4-5, Comments of U S WEST at 6, Comments of USTA at 4.

service are actually not subject to competitive pressures, the Commission must also conclude that deaveraged loops would not expose ILECs to arbitrage opportunities. The Commission would therefore need to reassess the circumstances, if any, under which it should permit geographic deaveraging for common line access elements.

Finally, there is a real question as to whether the switching access elements should be deaveraged under any circumstances. TWTC stated in its initial comments (at 30-31) that it knew of no evidence to support deaveraged switching. Several parties, however, have claimed in their comments that some basis actually exists for such deaveraging. For example, Sprint argues that switching costs "rise sharply as the number of lines connected to the switch falls below 20,000." Sprint Comments at 7. The ILECs also make vague statements that geographic deaveraging for switching is justified. See, e.g., USTA Comments at 8. These assertions should be seriously scrutinized in light of AT&T's contrary assertion. See AT&T Comments at 7-8. Moreover, as with common line deaveraging, the circumstances under which deaveraging is appropriate are critically dependent on the Commission's assessment of whether the switched access providers are subject to competitive pressures.

IV. THERE IS NO SUPPORT IN THE RECORD FOR ADOPTING A CAPACITY-BASED SWITCHING RATE STRUCTURE.

There is an astonishingly uniform opposition among the commenting parties to the Commission's proposed capacity-based rate structure for switching access services. Most striking is the fact that the long distance carriers, the intended beneficiaries of the proposal, oppose it.[12] In fact there is no factual evidence in the record that supports the adoption of a capacity based charge. The proposal must therefore be abandoned.

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[12] See Cable & Wireless Comments at 5 ("To the extent that the Commission proposes to *completely* eliminate local switching priced on a per-minute basis, C&W USA strongly objects to the Commission's proposal")(emphasis in original); MCI WorldCom Comments at 10-12 (opposing capacity-based charges as unnecessarily complex, expensive to implement, and unlikely to produce significant increases in efficiency); Sprint Comments at 10-13 (recommending CALLS proposal to reallocate 25% of the interstate switching costs to the common line instead of a capacity-based switching charge and raising further problems associated with implementing capacity-based charges); AT&T comments at 12-16 (arguing that there is no evidence that per minute charges are inefficient and that it is unclear that the number of trunks purchased by an IXC "is not necessarily a good proxy for the amount of switching capacity required during peak periods").

V. CONCLUSION

The Commission should implement rules reforming its interstate access regime in accordance with these comments.

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